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19 Attorneys for Bank of Montreal, as Administrative Agent

20
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

21 BANK OF MONTREAL, as Administrative
 22 Agent,

23 Plaintiff

24 v.

25 SK FOODS, LLC

26 Defendant.

27 v.
 28 SK PM CORP. and FREDERICK SCOTT
 29 SALYER, as Trustee for the Scott Salyer
 30 Revocable Trust, FREDERICK SCOTT
 31 SALYER, in his Individual Capacity

32 Respondents.

33 Case No. 11-CV-80133 MISC - EJD (HRL)

34 DECLARATION OF BRADLEY SHARP,
 35 CHAPTER 11 TRUSTEE, IN SUPPORT OF BANK OF
 36 MONTREAL's OBJECTION TO THE *Ex Parte*
 37 APPLICATION FOR ORDER VACATING HEARING
 38 AND ADMINISTRATIVE MOTION FOR STAY OF
 39 PROCEEDINGS

40 Honorable Edward J. Davila

41 Hearing Date: August 19, 2011

42 Hearing Time: 9:00 a.m.

43 Place: Robert F. Peckham Federal Building
 44 280 South 1st Street
 45 San Jose, CA 95113

1 I, Bradley D. Sharp, pursuant to 28 U.S.C. §1746, declare:

2 1. I submit this Declaration (the “*Declaration*”) in my capacity as the duly
 3 appointed and acting Chapter 11 Trustee (when referring to myself in such capacity, the
 4 “*Trustee*”) of SK Foods, L.P. (“*SK Foods*”) and RHM Industrial Specialty Foods, Inc. d/b/a
 5 Colusa County Canning Co. (“*RHM*” and collectively with SK Foods, the “*Debtors*”), in
 6 support of Bank of Montreal’s Objection to the Ex Parte Application for Order Vacating
 7 Hearing and Administrative Motion for Stay of Proceedings (the “*Objection*”).

8 2. Except as otherwise noted, I make this Declaration based upon my own personal
 9 knowledge. If called as a witness, I could and would testify to the facts set forth in this
 10 Declaration.

11 3. I have significant experience serving as Trustee in Chapter 11 cases. As part of
 12 this role, I have performed numerous tasks, including analyzing claims and pursuing causes of
 13 action of the bankruptcy estate.

14 4. In connection with my duties as Trustee, I have reviewed and analyzed that
 15 certain Amended and Restated Credit Agreement dated as of September 27, 2008 between and
 16 among Bank of Montreal, as Administrative Agent (“*BMO*” or the “*Agent*”) and the Debtors,
 17 as Borrowers, and SK Foods, LLC as Guarantor.

18 5. Shortly after my appointment as Trustee in the Debtors’ bankruptcy cases in
 19 May of 2009, I was informed through my counsel that BMO was planning to institute a
 20 proceeding in the U.S. District Court for the Northern District of Illinois against SK Foods
 21 LLC to recover on the guaranty it gave to BMO on account of the Debtors’ indebtedness.

22 6. Throughout the course of my duties as Chapter 11 Trustee in this matter, and in
 23 fulfillment of my duties to the Bankruptcy Court, I have commenced numerous adversary
 24 proceedings against Scott Salyer and various entities that he controls.

25 7. One such adversary proceeding I instituted is entitled Sharp v. Salyer, et al,
 26 Adv. Proc. No. 10-2014 (the “*Substantive Consolidation Action*”) against the defendants Scott
 27 Salyer (“*Salyer*”), as a trustee of the Scott Salyer Revocable Trust, SK PM Corporation,

1 SK Foods, LLC, SKF Canning, LLC, Blackstone Ranch Corporation, Monterey Peninsula
2 Farms, LLC, Salyer Management Company, LLC, SK Farms Services, LLC, SK Frozen Foods,
3 LLC, SS Farms, LLC, SSC Farming, LLC, SS Farms I, LLC, SS Farms II, LLC, SS Farms III,
4 LLC, and SKF Aviation, LLC (collectively, the “*Defendants*”). This action seeks to
5 “substantively consolidate” various entities owned or controlled by Salyer with those of the
6 Debtors, or alternatively, to avoid and recover assets of the Debtors that were transferred to the
7 Defendants in that action. Substantive consolidation is an equitable doctrine arising under the
8 Bankruptcy Code. Substantive consolidation is appropriate where it is shown that either
9 (a) creditors relied on the credit of the consolidated entity, or (b) that the assets and liabilities
10 of the entities are entangled to such an extent that it is impracticable to identify the assets and
11 liabilities of each entity. *In re Bonham*, 229 F.3d 750, 763 (9th Cir. 2000). If granted,
12 substantive consolidation in effect merges the assets and liabilities of the Defendants into the
13 Debtors’ bankruptcy estate. The Defendants’ assets are pooled with the Debtors, and those
14 pooled assets are then used to pay allowable claims of both the Debtors and the Defendants.

15 8. The Substantive Consolidation Action complaint alleges that SK Foods created,
16 funded and operated many of the Defendants to such an extent that their financial affairs and
17 identities are inextricably entangled with those of the Debtor. Funds were transferred between
18 the Debtor and the Defendants whenever one entity needed funds or whenever it suited the tax
19 planning purposes of Salyer, the ultimate owner of all Defendants. The complaint further
20 alleges that the Defendants have little, if any, operations outside of their relationships with the
21 Debtors, never dealt with the Debtors at arm’s-length, they relied on the Debtors to create,
22 store and maintain their records and to provide management and administrative services, never
23 observed corporate formalities separate and apart from the Debtors, and generally existed
24 solely to benefit the operations of the Debtor and to shelter assets from creditors of the various
25 Defendants.

26 9. That matter is ongoing, and is now subject to a stay of proceedings which is
27 currently on appeal to the District Court for the Eastern District of California, and is also

1 subject to a motion seeking to certify the question for direct appeal to the U.S. Court of
 2 Appeals for the Ninth Circuit.

3 10. In my view, the factual and legal issues in the Substantive Consolidation Action
 4 are dissimilar from what is at issue in BMO's alter ego proceeding. For example, in BMO's
 5 alter ego proceeding, BMO is seeking to hold the respondents therein liable for a judgment it
 6 obtained against one of the defendants in the Substantive Consolidation Action, SK Foods,
 7 LLC. As I understand it, the focus is on whether BMO can establish whether it meets the
 8 criteria for holding SK Foods LLC's parent entities liable for its deficiency judgment. In
 9 contrast, however, the Substantive Consolidation Action is concerned not merely with Salyer
 10 and SKPM Corp.'s actions and conduct toward BMO, but rather on the financial
 11 interrelationships among and between numerous other Defendant entities, and on whether
 12 creditors as a whole viewed SK Foods as one combined enterprise.

13 11. SK Foods, LLC and the other Salyer-controlled entities which are defendants in
 14 that proceeding are actively contesting the issue of substantive consolidation.

15 12. I have attempted throughout the Debtors bankruptcy cases to efficiently resolve
 16 creditor claims and maximize value of the Debtors' assets. To that end, I have sought and
 17 obtained several injunctions against Mr. Salyer and the various entities he controls. I have also
 18 at commenced contempt proceedings to remedy violations of these injunctions.

19 13. I have been aware of and have monitored BMO's proceeding against SK Foods,
 20 LLC since its commencement in June of 2009.

21 14. In the Spring of 2011, I was informed that BMO was planning to institute a
 22 proceeding against Salyer, his *inter vivos* trust, and SK PM Corp., wherein it sought to hold
 23 them liable for the judgment it had obtained against SK Foods, LLC. As such, I have been
 24 fully aware that BMO was instituting this proceeding at all relevant times.

25 15. I have no objection to BMO's institution of this proceeding or seeking the relief
 26 sought in the Show Cause Motion.

1 16. I do not believe that BMO's action violates the automatic stay in the Debtors'
2 bankruptcy cases, or adversely impacts the Substantive Consolidation Action or the bankruptcy
3 estate generally because at this stage, the proceeding will merely determine whether Salyer, his
4 inter vivos trust, and SK PM Corp., are liable on the judgment against SK Foods, LLC.

5 17. If I felt it necessary to do so, I could and would raise an objection if I believed
6 that BMO was violating the automatic stay or usurping a cause of action of the estate.

7 18. I have numerous means at my disposal to do so, including Sections 105, 362,
8 and other provisions of the Bankruptcy Code.

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2 19. I will continue to monitor these proceedings, and raise any appropriate
3 objections that I deem necessary to be in the best interest of the Debtors' creditors.
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6 I declare under penalty of perjury, under the laws of the United States of America and
7 the State of California, that the foregoing is true and correct to the best of my knowledge and
8 belief.
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10 EXECUTED this 16 day of August, 2011 in Los Angeles, California
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14 BRADLEY D. SHARP
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